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10715765

TRANSMITTAL FORM (to be used for all correspondence after initial filing)	Application Number	11/745,765
	Filing Date	November, 18 2003
	First Named Inventor	Robert E Sinclair. II
	Group Art Unit	2626
	Examiner Name	Leonard Saint Cyr
<input type="checkbox"/> Sent via Express Mail Label No.:	Attorney Docket Number	304557.01

ENCLOSURES (check all that apply)		
<input type="checkbox"/> Fee Transmittal Form <input type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment / Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement with Form PTO/SB/08A (pages) <input type="checkbox"/> Response to Notice to File Missing Parts <input type="checkbox"/> A copy of the Notice to File Missing Parts Under 37 CFR 1.52 or 1.5	<input type="checkbox"/> Assignment Papers (for an Application) <input type="checkbox"/> Drawing(s) (sheets) <input type="checkbox"/> Declaration <input type="checkbox"/> Newly Executed (9 pages) <input type="checkbox"/> A copy from a prior application (37 CFR 1.63(d)) (pages) <input type="checkbox"/> Licensing-related Papers <input checked="" type="checkbox"/> Petition (7 pages) <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> General Power of Attorney (SB80) <input type="checkbox"/> 37 CFR 3.73(b) Statement <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____	<input type="checkbox"/> After Allowance Communication to TC <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input type="checkbox"/> Application Data Sheet <input type="checkbox"/> Request for Corrected Filing Receipt <input checked="" type="checkbox"/> Return Receipt Postcard <input type="checkbox"/> Other Enclosure(s) (please identify below): <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
CERTIFICATE OF MAILING OR TRANSMISSION (Under 37 CFR § 1.8(a)) I hereby certify that this correspondence is being: <input checked="" type="checkbox"/> deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: Mail Stop Petitions, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450; or <input type="checkbox"/> transmitted by facsimile on the date shown below to the USPTO at (571) _____. October 30, 2007 Date Signature Darcy Kobylarczyk Printed Name		
Remarks <input checked="" type="checkbox"/> The Commissioner is hereby authorized to charge any additional fees required, or credit any overpayments, to Deposit Account No. 50-0463 for the above identified patent application.		

SIGNATURE OF ATTORNEY OR AGENT			
Signature	/James T. Strom/	Reg. No.	48,702
Name of Attorney or Agent		James T. Strom	
Date	30 Oct 2007	Tel.	425-939-0781
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Customer Number:		22971	



PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

First Named Inventor: Sinclair, Robert E. II
Application No.: ~~11/715,765~~ **10715765**
Filed: 18 Nov 2003
Customer No.: 22971
Title: ADAPTIVE COMPUTING ENVIRONMENT

Attorney Docket No.: 304557.01
Group Art Unit: 2626
Confirmation Number: 5254
Examiner: Saint Cyr, Leonard

Mail Stop Petitions
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

PETITION UNDER RULE 1.181(a) TO WITHDRAW HOLDING OF ABANDONMENT

Sir:

This Petition is filed under 37 CFR § 1.181(a) in response to a Notice of Abandonment mailed September 17, 2007.

Type of Response: Petition under Rule 181(a)

Application Number: ~~11/715,765~~

Attorney Docket Number: 312651.01

Filing Date: 2 Feb. 2005

10/715765

REMARKS

INTRODUCTION: BASIS FOR PETITION

This is a Petition, filed under 37 CFR 1.181(a), to have a Notice of Abandonment withdrawn by the Patent Office. According to MPEP 711.03(c)(I):

Where an applicant contends that the application is not in fact abandoned (e.g., there is disagreement as to the sufficiency of the reply, or as to controlling dates), a petition under 37 CFR 1.181(a) requesting withdrawal of the holding of abandonment is the appropriate course of action, and such petition does not require a fee.

As shown below, the present application is not in fact abandoned and withdrawal of the holding of abandonment is requested.

STATEMENT OF FACTS

1. A Final Office Action was mailed April 6, 2006.
2. An Examiner Interview was held May 16, 2006.
3. An "Examiner Interview Summary", was mailed on May 16, 2006, in which both Examiners stated that "[a] new non final office action is forthcoming." The Examiner Interview Summary was signed by both the Examiner Pierre and the Supervisory Examiner Dorvil.
4. No new office action has been mailed.
5. A Notice of Abandonment was mailed September 17, 2007.
6. Applicant left voice messages with the Examiner on several occasions through October 2007.
7. Applicant spoke with Examiner Saint Cyr (Oct. 19, 2007) and Supervisory

Type of Response: Petition under Rule 181(a)

Application Number: 10/715765

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Filing Date: 2 Feb. 2005

PATENT

Examiner Dorvil (Oct. 22, 2007) and both indicated that, while the Notice of Abandonment was in error, the Notice of Abandonment would not be withdrawn until a petition for same was granted.

8. This Petition is filed before the two-month due date of November 17, 2007.

POINTS TO BE REVIEWED

Propriety of the Notice of Abandonment mailed September 17, 2007.

RELEVANT RULES AND MPEP SECTIONS

37 CFR § 1.2:

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.

MPEP § 706.07(d) states that:

If, on request by applicant for reconsideration, the primary examiner finds the final rejection to have been premature, he or she should withdraw the finality of the rejection. The finality of the Office action must be withdrawn while the application is still pending. The examiner cannot vacate the final rejection once the application is abandoned.

37 CFR § 1.133:

An interview does not remove the necessity for reply to Office actions as specified in §§ 1.111 and 1.135

Type of Response: Petition under Rule 181(a)

Application Number: [REDACTED] 8 **10/715765**

Attorney Docket Number: 312651.01

Filing Date: 2 Feb. 2005

MPEP § 713.01 (emphasis added):

Sometimes the examiner who conducted the interview is transferred to another Technology Center or resigns, and the examination is continued by another examiner. *If there is an indication that an interview had been held, the second examiner should ascertain if any agreements were reached at the interview. Where conditions permit, as in the absence of a clear error or knowledge of other prior art, the second examiner should take a position consistent with the agreements previously reached.*

DISCUSSION

The September 17, 2007 Notice of Abandonment should be withdrawn because the Patent Office withdrew or vacated the Final Office Action on which the Notice of Abandonment is based. There was an Examiner Interview on May 16, 2006. During the Interview, Examiners Pierre and Dorvil agreed that a "new non final office action is forthcoming" (Examiner's Interview Summary, May 16, 2007). While it is true that an Interview does not remove the necessity for reply to Office actions (37 CFR § 1.133), in the present case there was no outstanding Office Action at the time of the Notice of Abandonment, because the Patent Office had vacated the Action. It is not the Interview which relieves Applicant of having to respond to the April 6, 2006 Office Action, but rather it is the written and mailed withdrawal of the Office Action which removes any duty to respond.

The withdrawal was authorized by MPEP 706.07(d) which notes that a primary examiner has the power to "vacate" a final Office action; "if ... primary examiner finds the final rejection to have been premature, he or should withdraw the finality". The primary examiner in the present case clearly exercised that power and, by signed writing, vacated both the April 6, 2006 Action as well as the finality thereof. This was within the primary examiner's power as it occurred

Type of Response: Petition under Rule 181(a)

Application Number: ~~11/863,768~~ **10/715765**

Attorney Docket Number: 312651.01

Filing Date: 2 Feb. 2005

PATENT

while the application was still pending; the period for reply had not expired.

As stated in Application of Kaghan, 55 C.C.P.A. 844, 387 F.2d 398, 401 (CCPA 1967), "An applicant should be entitled to rely not only on the statutes and Rules of Practice but also on the provisions of the MPEP in the prosecution of his patent application." In the instant case Applicant was entitled to rely on the provisions of the MPEP indicating that a Primary Examiner may withdraw a final office action.

Finally, Applicant notes that in a similar case, in Application No. 09/938,465, a petition to withdraw abandonment was denied. In that case, an Examiner's Interview Summary was of record but "nowhere [was] it stated that the final Office action would be withdrawn". Furthermore, the interview and summary thereof occurred after the time for replying to the outstanding rejection had passed. The decision of 09/939,465 is mentioned because it suggests that a timely Examiner's Interview Summary clearly vacating the action (as in the present case) should be given such effect.

In sum, there is no outstanding rejection, and therefore the September 17 Notice of Abandonment is incorrect in stating that Applicant failed "to timely file a proper reply to the Office letter mailed on 05 April 2006" (actual date mailed was April 6). The Patent Office officially withdrew or vacated the Office Action and there was no Office letter which required reply by Applicant.

ACTION REQUESTED: WITHDRAWAL OF HOLDING OF ABANDONMENT

In accordance with Rule 181(a) and MPEP 711.03(c)(II), Applicant requests withdrawal of the "Notice of Abandonment" mailed September 17, 2007. The April 6, 2006 Final Office Action was withdrawn. The withdrawal was made in an Examiner's Interview Summary, which was made in writing and signed by the same Supervisory Examiner who signed the Final Action.

Type of Response: Petition under Rule 181(a)

Application Number: [REDACTED]

Attorney Docket Number: 312651.01

Filing Date: 2 Feb. 2005

10/715765

PATENT

CONCLUSION

Should any fees be required in connection with this document, the Commissioner is authorized to charge those fees to Deposit Account No. 50-0463.

If the Office believes a telephone interview would be helpful to expedite prosecution, the Office is invited to contact Applicant's undersigned representative at the telephone number below.

Respectfully submitted,
Microsoft Corporation

Date: 30 Oct 2007


By: /James T. Strom/

James T. Strom, Reg. No.: 48,702
Attorney for Applicants
Direct telephone 425-939-0781

CERTIFICATE OF MAILING OR TRANSMISSION
(Under 37 CFR § 1.8(a)) or ELECTRONIC FILING

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Mail Stop Petitions, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450 or facsimile transmitted to the U.S. Patent and Trademark Office on the date shown below.

October 30, 2007
Date



Darcy Kobylarczyk

Type of Response: Petition under Rule 181(a)

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